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Attorney for Plaintiff Larry Williams

**UNITED STATES DISTRICT COURT**

SOUTHERN DISTRICT OF CALIFORNIA, SAN DIEGO DIVISION

LARRY WILLIAMS ) CASE NO. 09-CV-1836-LAB-WMC  
Plaintiff, )  
-v- ) PLAINTIFF LARRY WILLIAMS'  
SCRIBD, INC., a corporation; GalaxiaMia sued ) OPPOSITION TO DEFENDANT  
DOE 1; api\_user\_11797\_malvik as Doe 2; ) SCRIBD, INC.'S RULE 12(b)(6)  
kmanto as Doe 3; api\_user\_11797\_ ) MOTION TO DISMISS  
EBOJSAJE as Doe 4; mikaj as Doe 5; )  
kanthbnm sued as Doe 6; api\_user\_11797\_ ) Date: February 22, 2010  
this sued as Doe 7; api\_user\_11797\_ ) Time: 11:15 a.m.  
rado... sued as Doe 8; api\_user\_11797\_ ) Dept: 9  
rid...sued as Doe 9; and Does 10 to 40 ) Judicial Officer: Hon. Larry A. Burns  
e upload infringers to be named; )  
Defendants. )

Plaintiff LARRY WILLIAMS respectfully submits the following memorandum in support of his opposition to Defendant SCRIBD, INC.'s motion to dismiss his original complaint pursuant to Rule 12(b)(6):

## I. INTRODUCTION

Plaintiff Williams files this opposition in an abundance of caution. Plaintiff filed a First Amended Complaint on February 5, 2010, but this motion to dismiss remains on the Court's calendar.

This action is for copyright infringement. Defendant SCRIBD, INC. filed its motion to dismiss based on grounds of failure to state a claim for "direct, contributory, or vicarious

1 copyright infringement" as to Plaintiff's first claim. As to Plaintiff's second claim for alleged  
 2 conspiracy to commit copyright infringement, Defendant claims "if it is a federal claim it is  
 3 identical to the first claim as contributory copyright infringement, and if it is a state law claim it  
 4 is preempted. . ."

5 Plaintiff's third claim for misappropriation of right of publicity, fails to state a claim  
 6 because it is preempted by the federal Cox-Wyden Amendment to the Communications  
 7 Decency Act, 47 U.S.C. § 230. Plaintiff's fourth claim for unjust enrichment was attacked as  
 8 preempted by the Copyright Act.

9 Plaintiff chose to amend pursuant to Rule 15(a) as a matter of right prior to a  
 10 responsive pleading. The Rule 12(b) motion is not a responsive pleading. See,  
 11 Schwarzer, Tashima & Wagstaffe, "Cal. Prac. Guide, Fed. Civ. Pro. Before Trial" (The  
 12 Rutter Group 2009) at p. 9-86. Plaintiff's First Amended Complaint was served and filed  
 13 on February 5, 2010.

## 14       **II. PLAINTIFF'S FIRST AMENDED COMPLAINT SUPERSEDES THE 15           ORIGINAL COMPLAINT**

16 Plaintiff's First Amended Complaint supersedes the original complaint when it is  
 17 served. See, *Doe v. Unocal Corp.*(CD CA 1998) 27 F. Supp. 2d 1174, 1180, aff'd (9<sup>th</sup>  
 18 Cir. 2001) 248 F. 3d 915, 920.

## 19       **III. THE MOTION TO DISMISS SHOULD BE MOOTED**

20 Defendant's motion to dismiss attacks the original complaint and should be mooted.  
 21 Schwarzer, Tashima & Wagstaffe, "Cal. Prac. Guide, Fed. Civ. Pro. Before Trial" (The Rutter  
 22 Group 2009) at p. 9-87.

23 Plaintiff addressed several of the issues raised in the motion to dismiss in his  
 24 amended complaint. The unjust enrichment cause of action was removed. The contributory  
 25 and vicarious copyright infringement claims were also broken into separate claims for relief  
 26 and there is no "conspiracy" allegation. The preemption argument, after research, on the  
 27 unjust enrichment claim for relief was well taken and that claim for relief was removed from the  
 28

1 new amended pleading. Plaintiff also more fully sets forth his copyright registrations and his  
2 rights to enforce those copyrights issued in his publisher's name.

3 Plaintiff also addresses Defendant SCRIBD's unreasonably, lengthy time delays in  
4 removing all Plaintiff's works from its site. Defendant SCRIBD's failure to expeditiously  
5 remove Plaintiff's works and its failure to implement reasonable procedures to remove  
6 infringing materials creates, at the very last, questions of fact and law as to whether SCRIBD  
7 can avail itself to the DMCA.

8 Plaintiff's misappropriation of identity claim is not preempted. Where a Defendant  
9 misappropriates the identity or image of the Plaintiff, the Copyright Act does not preempt  
10 the Plaintiff's claim. *Laws v. Sony Music Entertainment, Inc.*, 294 F.Supp.2d 1160, 1164  
11 (C.D.Cal. 2003). The Copyright Act does not address misuse of another's image and  
12 cannot preempt such claims.

13 Plaintiff's Contributory and Vicarious Infringement claims present questions of fact and  
14 law. It is undisputed that direct infringement took place on Defendant SCRIBD's website.  
15 SCRIBD was aware of that infringement and addressed that infringement on their website.  
16 Taking the allegations in the light most favorable to the Plaintiff, SCRIBD did use their  
17 website to induce further infringement by offering protection to direct infringers by creating a  
18 completely anonymous system. SCRIBD also made taking down infringing works  
19 unnecessarily hard, in order to induce further and continue current infringement.

20 Defendant SCRIBD profited from the infringing material. The courts have found a direct  
21 financial benefit when the website merely drew in more subscribers with the infringing  
22 material. *A&M Records, Inc., v. Napster, Inc.*, 239 F.3d 1004, 1023 (Cal. 2001). SCRIBD  
23 admits on their website that use Google's adsense, which pays as more views are attracted  
24 to the website. Further, SCRIBD's attempts to remove the infringing material are an attempt  
25 to appear as though they comply with the DMCA, while providing no real protection.

1 SCRIBD's slow response and lengthy delays in removing the infringing material amounts to  
2 bad faith.

3 Several attempts to resolve the mootness issue after service and filing of Plaintiff's First  
4 Amended Complaint were attempted, but there has been no agreement, yet, to take the  
5 hearing on the motion to dismiss the original complaint off calendar. The attempts to meet  
6 and confer included telephone calls and a letter requesting the motion be taken off calendar.  
7 This opposition is filed in an abundance of caution should the hearing on the motion to  
8 dismiss go forward.

9 **IV. CONCLUSION**

10 Plaintiff Larry Williams amended his original complaint while Defendant SCRIBD's  
11 motion to dismiss for failure to state claims was pending. The motion to dismiss as to the  
12 original complaint, which is superseded by the amended complaint, should be mooted.  
13 Defendant is not prevented from bringing a new motion to dismiss as to the First Amended  
14 Complaint. Plaintiff respectfully requests this Court deny Defendant's motion to dismiss.

15 Respectfully submitted.

16 DATED: February 8, 2010

17 *LAW OFFICE OF KURT W. HALLOCK*

18 S/ Kurt W. Hallock  
By: \_\_\_\_\_  
19 Kurt W. Hallock, Attorney for  
Attorney for Plaintiff Larry Williams

21 **PROOF OF SERVICE**

22 I, the undersigned, declare that I am over the age of eighteen years and not a party to  
23 this action. I am employed in the County of San Diego where this service occurred. My  
24 business address is 110 West "C" Street, Suite 1905, San Diego, California 92101. I  
25 hereby certify that on February 8, 2010, I electronically transmitted:

- 26 1) Plaintiff Larry Williams' Opposition to Defendant Scribd, Inc.'s Motion to Dismiss

1 To the Clerk's Office pursuant to Electronic Case Filing Administrative Policies and  
2 Procedures using the CM/ECF System for filing and transmittal of a Notice of Electronic  
3 Filing to the Following CM/ECF registrants who have consented to electronic service  
4 through the Court's transmission facilities:

5 Richard P. Sybert, e-mail: [rsybert@gordonrees.com](mailto:rsybert@gordonrees.com);

6 Attorney for Defendant Scribd, Inc.

7 Yuo-Fong C. Amato, e-mail: [rsybert@gordonrees.com](mailto:rsybert@gordonrees.com);

8 Attorney for Defendant Scribd, Inc.

9 I declare under penalty of perjury under the laws of the United States that the foregoing  
10 is true and correct. Executed on February 8, 2010 at San Diego, CA.

11 S/ Kurt W. Hallock

12 \_\_\_\_\_  
13 Kurt W. Hallock